TENG YOKE CHONG

v.

TENG YOON CHAI & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[CIVIL SUIT NO. 236 OF 1984]
14 AUGUST 1986

TRUSTS: *Administration of trusts - Trustee's duty to give information to beneficiaries and to keep proper accounts - Duty to account for all benefits derived from the trust property - Order for accounts obtained - Trustees failed to deliver accounts to the beneficiary - Order for appointment of Independent Assessor applied and obtained - Whether Court should rely on the estimate of the Independent Assessor - Whether the accounting documents filed by defendants but qualified by their accountants could be relied upon to form a true estimate of the income from the trust property - Whether plaintiff had in fact been advanced an average sum of RM250 monthly from 1972 - Trustee de son tort.*

This was a civil action by the beneficiary against the trustees for orders consequential upon accounts and enquiries on the footing of wilful default. The plaintiff's claim is for all the income derived from the trust property from the inception of the trust to 30 March 1983, the day when the trust property was vested in the plaintiff as registered owner. The 1st defendant averred that there was no income from the trust property from 1963 to 1972 and that from 1972 to 5 February 1981, the plaintiff had been receiving a monthly sum of a few hundred dollars for livelihood and education. The 2nd defendant denied that he is a trustee *de son tort* and asserts that the monthly advances to the plaintiff for his livelihood and education exceed the income derived from the trust property. Both defendants denied wilful default.

In August 1984, the plaintiff applied by way of a summons-in-chambers under O. 43 of the Rules of the High Court 1980 for accounts to be rendered by the defendants, failing which, the plaintiff be permitted to appoint an independent assessor. The order was given in September 1984 and by mutual agreement the defendants were given 2 months to produce the accounts.

However, no accounts were forthcoming. Consequently the plaintiff applied and obtained an order to appoint an independent assessor, who estimated the income derived from the trust property during the period in issue to be RM109,671.

Held:

[1] Whenever a trust is established, the trustees must keep proper accounts. If they do not do so they render themselves liable to be charged with monies they have received or ought to have received.

[2] Where no proper accounts are produced, it is only in the most exceptional cases that trustees could be forgiven for lapses on their part.

[3] If the trustees have been delinquent in failing to produce proper accounts, then the Court will have to do the best it can, on the material before it, so as to make sure that justice is done.

[4] The accounting documents filed by the defendants were disregarded because they were qualified by their own accountants.

[5] There was no cogent evidence that the defendants had in fact advanced an average sum of RM250 monthly from 1972 because the 1st defendant had no personal knowledge of the matter and the 2nd defendant was not a witness of truth.

[6] In the circumstances, the estimates of the independent assessor were accepted because his approach was professional and the estimates were conservative.

[7] For the reasons stated above, judgment was given against the defendants in the sum of RM106,671 (after setting off a sum of RM3,000), plus interest at 8% per annum on the amount due as from 29 March 1983 to the date of realisation.

[Judgment for the plaintiff with costs.]

Case referred to:
In Re Taylor; Turpin v. Pain [1890] 44 Ch D 128

Legislation referred to:
Rules of the High Court 1980, O. 43

Other source referred to:
Halsbury's Laws of England, 4th Edn. para. 830.

For the plaintiff - Yusuf Khan bin Ghows Khan, M/s. Yusuf Lee Pathma & Marbeck
For the defendants - T.S. Chong; M/s. T.S. Chong & Co.

JUDGMENT

Mahadev Shankar J:

The plaintiff is a beneficiary under a trust. He is seeking orders consequential upon accounts and enquiries taken against his trustees.

The tale begins with his father Tens San Choo who was in the first instance married to Lee Ah Choi. From her he had 3 boys and 2 girls. The boys were Teng Yew Chong, the eldest, Teng Sit Chong, and Tan Yu Chong @ Teng Yu Chong. Teng San Choo also married Ho Koon Wah, a widow who already had three children by a previous marriage. Through her he had another son Teng Yoke Chong, the plaintiff in this suit.

Some years prior to 1963 Teng San Choo bought the rubber estate in Kota Tinggi which was comprised in a single title for 105 acres. This title was registered in the name of his first wife Lee Ah Choi and the eldest son Teng Yew Chong. In 1963 the land was subdivided into 10 titles. Two titles each were beneficially registered in the names of the first wife Lee Ah Choi, Teng Yew Chong, and Teng Sit Chong. Since Tan Yu Chong @ Teng Yu Chong and the plaintiff Teng Yoke Chong were then both infants, the eldest son Teng Yew Chong was registered as trustee of the two lots-which were settled on each of them.

This case concerns the plaintiff's two lots. These are comprised in Johore certificate of title No. 9659 and 9661 for lots 3678 and 3680 in area, together, approximately 20 acres. The plaintiff contends that the terms of the trust was that Teng Yew Chong should hold and manage the said property for the plaintiff until he attained the age of 21 years. This is not disputed by the defendants.

The evidence suggests that all the 10 lots were run as a rubber estate from 1963. As the registered trustee of the plaintiff's lots, Teng Yew Chong must in law be taken to have assumed that liability since then. On 5 February 1981 he died. As his personal estate he left behind his rubber estate, a medicine shop which he ran during his lifetime, and cash of about RM80,000 plus in the bank. On the minus side, one of the liabilities he left behind him was

his duty to account for the benefits derived from the two lots of the plaintiff who was then 20 years and 2 months old.

Teng Yoon Chai the 1st defendant in this suit, is the son of Teng Yew Chong. The 2nd defendant is his uncle. As from the date of Teng Yew Chong's death he took over the active running of the rubber estate including the plaintiff's lots. The plaintiff contends, correctly in my view, that Teng Sit Chong therefore became a trustee *de son tort.*

The defendants do not deny that after the death of Teng Yew Chong, they split between themselves and Tan Yu Chong @ Teng Yu Chong a sum of RM30,000 each from the estate. Why the two uncles should have shared in this money is not clear. But so far as the plaintiff was concerned, the defendants denied that in combination with Tan Yu Chong @ Teng Yu Chong they told him that the title deeds to his lots would not be returned to him unless he signed some papers that he had no further claim against the estate of Teng Yew Chong deceased.

What was not denied, is that until the plaintiff filed this suit on 27 April 1984, he had not been able to obtain any accounts whatsoever from the defendant of the income derived from his property from the inception of the trust up to 30 March 1983, on which day the plaintiff had obtained a vesting order for the said lots in his own favour as the registered owner.

Since then the evidence is that the plaintiff sub-contracted his lots and was in receipt of a regular income of RM800 per month.

The defendants each filed a formal defence. The 1st defendant averred that since the year 1963 up to the year 1972 there was no income whatsoever from the lands. He also asserted that since 1972 up to his father's death on 5 February 1981, the plaintiff had received from the deceased a monthly sum of a few hundred dollars for his livelihood and education which sum was in excess of whatever income could be produced from the plaintiff's lots.

The 2nd defendant also filed a similar defence. He admitted that he had assisted Teng Yew Chong in the management and supervision of the estate (excluding the financial aspect thereof) as from the year 1970 when Teng San Choo died but denied that he was a trustee *de son tort.* However, the 2nd defendant admitted that since the death of Teng Yew Chong on 5 February 1981, he as the 2nd son of Teng San Choo took charge of all the 10 titles up to March 1983 when the plaintiff got this vesting order. He also asserts that the plaintiff had received from him the 2nd defendant a few hundred dollars monthly for his livelihood and education in continuation of the practice carried out when Teng Yew Chong was in charge of the estate and that this sum was in excess of what the plaintiff's two lots could produce by way of income.

Both defendants therefore denied that there had been any wilful default and prayed that the action to be dismissed.

What is significant about these defences, is, that there was no denial that accounts had not been rendered to the plaintiff.

In August 1984 the plaintiff applied by way of a summons-in-chambers under O. 43 of the Rules of the High Court for accounts to be rendered by the defendants and in the event that these accounts did not materialise, the plaintiff be permitted to appoint an independent Assessor to estimate what the income from the two lots should have been.

I made such an order in September 1984 and by mutual agreement between Counsel for the parties, the defendants were given two months to produce accounts.

But no accounts materialised and in December 1984 the plaintiff applied and obtained an order for the appointment of the assessor.

Eventually the defendants produced some accounting documents which were collated by their accountant a Mr. Chong Sin Hoe who filed an affidavit which he deposed on 15 February 1985. He stated on oath:

> Due to lack of information I am unable to state whether the said accounts give a true and fair view of the state of affair of the rubber estate for the period covered from 1972 to 1982.

Thereafter the plaintiff's assessor went ahead and in October 1985 the plaintiff filed a formal report by his expert Mr. L.A. Huskisson. This report estimated that the probable nett accumulated income for the period 15 September 1983 to 29 March 1983 amounted to the sum of RM109,671.

The defendants contested this report. But on the strength of their own documents, their Counsel admitted that the income attributable for the period in issue was RM41,079.14. On the strength of this admission I made an order that this amount be paid over by the defendants to the plaintiff and that the balance be determined after the parties had an opportunity of tendering any further evidence they may desire and their respective witnesses had been cross-examined.

But the defendants did not pay the amount they admitted. They claimed the right to set off a round sum of RM33,750 which they asserted had been paid from 1972 to March 1983 at an average monthly sum of RM250. Consequently this claim also became an issue for trial.

However on 20 January 1986 I put the defendants on terms and made an order that the amount admitted be paid over to the plaintiff's solicitors to hold in trust on fixed deposit pending the final disposal of the case.

Thereafter further affidavits were filed and for the plaintiffs, oral evidence was given by Mr. Huskisson, the plaintiff himself, and his mother. The 1st and the 2nd defendants also gave evidence. The witnesses were cross-examined and Counsel for the parties made their respective submissions in writing.

Mr. Chong of Counsel for the defendants invited the attention to *Halsbury's Laws of England* 4th Edn. para. 830 which read:

> Duty to give information to beneficiary. A trustee must furnish to a beneficiary, or to a person authorised by him, on demand, information or the means of obtaining information as to the mode in which the trust property or his share in it has been invested or otherwise dealt with, and as to where it is and full accounts respecting it, whether the beneficiary has a present interest in the trust property or only a contingent interest in remainder, or is only an object of a discretionary trust. If the trustee neglects or fails to do so, he is liable to the costs of proceedings to compel production of the information or accounts. He must also allow a beneficiary to inspect the trust accounts and all documents relating to the trust, and has a duty to explain to the beneficiary what his rights are. A trustee is, however, entitled to receive from the beneficiary the costs of furnishing the information or accounts and to require him to pay those costs in advance or guarantee their payment. Indulgence is shown to a trustee from whom an account is demanded after a long lapse.

For myself, I would add that whenever a trust is established, the trustees must keep proper accounts. If they do not do so, they render themselves liable to be charged with monies they have received or ought reasonably to have received.

If there is a problem which is encountered in the course of the administration of a trust, it is always open for the trustees to apply to the Court for directions. Consequently where no proper accounts are produced, it is the opinion of this Court, that it is only in the most exceptional cases that trustees could be forgiven lapses on their part.

Although neither of the parties in this case cited it I would refer to *In Re Taylor; Turpin v. Pain* [1890] 44 Ch. D. 128 as the most useful parallel. In that case the widow Mary Ann Taylor died in August 1872. By her will she appointed her brothers to be her executors and trustees and directed them to carry on her farming business. The trust required them to provide for the maintenance and education of all her children during their minority and until her estate should be divisible under the trusts of her will and after the youngest of her children should attain the age of 21 years, in trust to divide the same among all her children equally. 14 years after her death, in 1886, her daughter commenced an action against the trustees for an account on the footing of wilful default and administration. In 1887 accounts were directed. The defendants had kept no proper accounts and after two years of proceedings in chambers without making any effectual progress, the matter was referred to the official referee. What happened after that, and the practice and method of taking accounts in chambers and before an official referee has been succinctly dealt with in the judgment of Chitty J I read his judgment at pp. 136 and 137 to mean in the context of the present case, that if the trustees have been delinquent in failing to produce proper accounts, then the Court will have to do the best it can, on the material before it, so as to make sure that justice is done.

The factual issues before me could be summarised as follows:

(1) Could the accounting documents filed by the defendants and collated by their accountant be safely relied upon to form a true estimate of the income from the plaintiff's lots?

(2) Was there proper evidence to prove on the balance of probabilities that the plaintiff had in fact been advanced an average sum of RM250 from the year 1972?

(3) Should the Court rely on the estimate of the plaintiff's expert?

The Court's opinion on these issues are as follows.

When the defendants' own accountant qualified the documents supplied by the defendants in the manner he had done, it becomes impossible for the Court to place any reliance upon them. Consequently they must be regarded as being worthless for the purposes of the present case.

On the second issue, neither of the defendants gave any cogent evidence on the alleged monthly advances. The 1st defendant had no personal knowledge whatsoever of the matter. As to the 2nd defendant it will be remembered that in his defence this defendant claimed to have personally made the advances to the plaintiff in continuation of the alleged previous practice. But having observed him in the witness box, I am firmly of the opinion that he was not a witness of truth. He could not give evidence of a single occasion when he had paid money to the plaintiff. Furthermore in none of the documents filed by the defendants is there any reference of any payment whatsoever to the plaintiff. To bolster their case, the defendants put into evidence a large number of letters which had been written by the plaintiff's mother begging for help. These documents made pathetic reading. What they went to show was that the plaintiff's mother was in a desperate situation from the time of her husband's death. Over the years she has estimated that the total sum paid to her could not have exceeded RM3,000 at best and the amounts came in such little drips and drops that they could not be

regarded as more than sops to salve the conscience of this deceased's trustee who as the eldest son of the family had undertaken upon himself to look after his father's dependants. I agree with plaintiff's Counsel that such payments as were made, cannot be related directly to the entitlement of the plaintiff. Nevertheless, since we are now dealing with equity, I would permit a set-off RM3,000in this case.

The last issue concerns the acceptability of Mr. Huskisson's estimates. I found his approach very professional and his estimates to be on the conservative side. He was not shaken in cross-examination. His report had been available to the defendants long before the date of the hearing. No one was called by the defendants to give evidence contrary to Mr. Huskisson's estimate. In the result this Court is content to admit his figure as representing a valid and correct estimate of what the income should have been from the plaintiff's lots from the inception of the trust.

Consequently I make the following orders.

I hold the plaintiff entitled to judgment against the defendants in the sum of RM106,671. Since the legal responsibility of the 2nd defendant only commenced on 6 February 1981, I hold that he be jointly and severally liable with the 1st defendant only for the payment for the sum of RM29,605 of this amount which is made up by adding the income set out in annexure 1 of Mr. Huskisson's report for the year 1981 with effect from 6 February 1981, and the years 1982 and 1983 up to 29 March 1983.

I also order that the sum of RM41,079 which was paid over to the plaintiff's solicitor on or about 20 February 1986 together with the interest accrued thereon and now held by the plaintiff's solicitor in trust be paid out to the plaintiff together with the interest accrued thereon in satisfaction *pro tanto* of the plaintiff's claim. This sum will be applied towards the reduction of the amount failing due to plaintiff prior to 5 February 1981. The accumulated income up to this point in time according to Mr. Huskisson's estimate was RM77,066.

The plaintiff has prayed for interest at 8% on the annual income estimated by Mr. Huskisson as from each of the years on which they fell due up to 20 March 1983.

Interest has always been a discretionary matter and in all the circumstances of this case, I do not think that I should go that far. I consider that the demands of justice will be met if I ordered interest at 8% on the amount due as from 29 March 1983 up to the date of realisation.

Finally there is the question of costs. Where there has been no misconduct on the part of trustees, the usual order is for the costs to be paid out of the estate. But in this case there has been misconduct on the part of the deceased and on the part of the 2nd defendant. Consequently I order that all the costs of the plaintiff arising out of the and incidental to this suit, including any fees paid out to Mr. Huskisson should be taxed and paid by the defendants to the plaintiff. The liability of the defendants in this regard shall be joint and several.

The parties have liberty to apply with regard to the settlement of any issue arising with regard to the finalisation of any interest calculation flowing from the application of the sum of RM41,079 now held by the plaintiff's solicitors in reduction of liabilities of the defendants herein.

The plaintiff may extract the necessary orders accordingly.

Also found at [1987] 1 CLJ 496